Office Supreme Court, U. S.
FILED
FEB 9 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925
No. 521

STANLEY P. ASHE, WARDEN OF THE STATE PENITENTIARY FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *Appellant,*

vs.

THE UNITED STATES OF AMERICA EX REL. JOSEPH VALOTTA.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

BRIEF FOR APPELLANT

GEORGE W. WOODRUFF,
Attorney General of Pennsylvania.

JAMES O. CAMPBELL,
First Deputy Attorney General of Pennsylvania.

SAMUEL H. GARDNER,
District Attorney of Allegheny County, Pennsylvania.

HARRY A. ESTEP,
First Assistant District Attorney of Allegheny County, Pennsylvania.
Attorneys for Appellant.

INDEX

		Page
I.	Report of Opinion of the Court below, ...	1
II.	Statement of Grounds on which Jurisdiction invoked, ...	1
III.	Statement of the Case, ...	3
IV.	Specification of Assigned Errors, ...	5
V.	Summary of Argument, ...	8

ARGUMENT:

1.	The Writ of *Habeas Corpus* cannot be Employed as a Substitute for a Writ of Error, therefore the Judgment should be Reversed and the Writ Discharged, ...	9
(a)	Rule Applied, ...	11
(b)	Instant Case not within Exceptions to the Rule, ...	14
(c)	Reasons for Non-interference with State Courts, ...	19
2.	Due Process of Law within the Terms of the Fourteenth Amendment to the Constitution of United States, ...	21
(1)	Matters of Procedure are not Included within the Due Process Clause of the Constitution:	
A.	General Rule, ...	22
B.	Twining vs. New Jersey and Preceding Cases, ...	24
C.	Cases since Twining vs. New Jersey, ...	33

D. Consolidation of Indictments—Historical Test:

(a) The English Rule, ... 36

(b) The Rule as Adopted in this Country, 38

E. Consolidation of Indictments—Analytical Test:

(a) In Pennsylvania, ... 42

(b) In the United States Courts, ... 48

F. The Common Practice of the People, ... 54

(2) Application of above Rules to Consolidation of the Indictment in the Valotta Case, ... 55

(3) Defendant Having Consented to be Tried Simultaneously on the Two Indictments is Bound by Such Waiver, ... 57

(4) Absence of Specific Order of Cosnolidation—Deprivation of Challenges:

(a) Consolidation, ... 59

(b) Deprivation of Challenges, ... 61

CASES CITED

Page

Act of Congress, Feb. 26, 1853, c. 80, Sec. 1 (Consolidation of Indictments), 10 Stat. 162, Comp. Stat., Sec. 1690 (R. S. Sec. 1024), ... 48

Act of Congress, Sec. 238, Judicial Code, as amended January 28, 1915, C. 22, Sec. 2, 38 Stat. 803, Comp. Stat. Sec. 1215, ... 2
Archbold, 8th Ed., Chap. 3, p. 95, ... 37

Bain, Ex parte, 121 U. S. 1, ... 18
Baker v. Grice, 169 U. S. 284, ... 11
Bonner vs. Gorman, 213 U. S. 86, ... 21, 28
Bowman vs. Lewis, 101 U. S. 22, ... 48
Brown vs. New Jersey, 175 U. S. 172, ... 22, 48, 61
Brown vs. United States, 143 Fed. 60, ... 61

Campbell v. State, (Tenn. 1836) 9 Yerger, 333, 30 Am. Dec. 417, ... 38
Chitty's Criminal Law, Vol. 1, p. 252, ... 37, 38
Commonwealth vs. Brown, 264 Pa. 85, ... 45
Commonwealth vs. Dupes, 14 Pa. C. C. Rep. 238, ... 44
Commonwealth vs. Fembleaux, 37 Lanc. Law Review 489, ... 45
Commonwealth vs. Gillespie, 7 S. & R. Rep. 469, ... 41
Commonwealth vs. Hand, 3 Philadelphia Rep. (Pa.) 403, ... 43, 58
Commonwealth v. Mullen, 150 Mass. 394, ... 42
Commonwealth vs. Wheeler, 75 Pa. Superior Ct. 84, . 44
Craig vs. Hecht, 263 U. S. 255, ... 13, 16

Davidson vs. New Orleans, 96 U. S. 97, ... 28
Davis v. Burke, 179 U. S. 399, ... 11
Dolan vs. U. S., 133 Fed. 440, 69 C. C. A. 274, ... 49, 53
Drury v. Lewis, 200 U. S. 1, ... 11
Duncan v. Missouri, 152 U. S. 377, ... 29

Filer vs. Steele, 228 Fed. 242, (affirmed *per curiam*, 241 U. S. 648), ... 12
Finley vs. California, 222 U. S. 28, ... 48

Frank vs. Mangum, 237 U. S. 309, ... 11, 19, 34, 58, 60
Frederich, In re, 149 U. S. 70, ... 11

Garland v. Washington, 232 U. S. 642, ... 33, 35
Glasgow v. Moyer, 225 U. S. 420, 428, ... 11, 14, 17
Goto vs. Lane, 265 U. S. 393, 401, 402, ... 11, 15

Hallinger v. Davis, 146 U. S. 314, ... 29
Hayes vs. Missouri, 120 U. S. 68, ... 29, 48
Haynes vs. U. S. (1900), 101 Fed. 817, 42 C. C. A. 34, . 59
Henry v. Henkel, 235 U. S. 219, ... 18
Henwood vs. Commonwealth, 52 Pa. 424, ... 43
Holden vs. Hardy, 169 U. S. 366, ... 28
Holden v. Minnesota, 137 U. S. 484, ... 30
Horn v. Mitchell, 243 U. S. 247, ... 2
Hotema vs. U. S., 186 U. S. 413, ... 52
Hunter vs. Pittsburgh, 207 U. S. 161, ... 47
Hurtado vs. California, 110 U. S. 516, ... 24, 28, 32, 62

Johnson v. Hoy, 227 U. S. 245, ... 11
Johnson v. State, 29 Ala. 62 (1856), 65 Am. Dec. 383, . 41

Kemmler, Re, 136 U. S. 436, ... 29
Kennard v. Louisiana, Morgan, 92 U. S. 480, ... 28
Kryger vs. Wilson, 242 U. S. 171, ... 21, 48

Lange, Ex parte, 18 Wall. 163, ... 18
Leeper vs. Texas, 139 U. S. 462, ... 22, 33
Logan vs. U. S., 144 U. S. 263, ... 50, 58, 60
Loney, In re, 134 U. S. 372, ... 14

Markuson v. Boucher, 175 U. S. 184, ... 16, 17, 19
Marshall vs. People of N. Y., 254 U. S. 380, ... 48
Maxwell vs. Dow, 176 U. S. 581, ... 62
McGehee's Due Process of Law, p. 165, ... 22, 23, 24
McMicking vs. Shields, 238 U. S. 99, ... 12
McMillan v. Anderson, 95 U. S. 37, ... 28
Medley, Petitioner, Re, 134 U. S. 160, ... 30
Missouri P. Railway Co. v. Mackey, 127 U. S. 205, ... 29
Missouri v. Lewis, 101 U. S. 22, ... 32
Moore v. Dempsey, 261 U. S. 86, ... 19

Neagle, In re, 135 U. S. 1, ... 14
New York v. Eno, 155 U. S. 89, ... 11
Nielson, In re, 131 U. S. 176, ... 18

Parks, Ex parte, 93 U. S. 18, ... 15, 18
People v. Feigelman, 223 Pac. (Cal.) 579, ... 46
People v. Gates, 13 Wend. 311 (N. Y. 1835), ... 42
People v. Potigian, 231 Pac. (Cal.) 593, ... 46
Peterson, Matter of Walter, 253 U. S. 300, ... 35
Pointer v. U. S. 151 U. S. 396, ... 38, 49, 60
Pothier v. Rodman, 261 U. S. 307, ... 2

Reg. v. Trueman, 8 Car. & P. 727, ... 37
Regina vs. Giddins, Car. & Mar., p. 634, ... 40
Riddle vs. Dyche, 262 U. S. 333, ... 13, 16
Riggins v. United States, 199 U. S. 547, ... 11
Rogers v. Peck, 199 U. S. 425, ... 34
Roscoe's Criminal Evidence, 8th Am. ed. 206, ... 37
Royall, Ex parte, 117 U. S. 241, ... 11, 18

Siebold, Ex parte, 100 U. S. 404, ... 18
Silvie v. State, 173 S. W. 857, 117 Ark. 108, ... 59
Snow, In re, 120 U. S. 274, ... 18
Spencer, Matter of, 228 U. S. 652, ... 14, 17, 20

Taylor's Due Process of Law, Sec. 4, pp. 4, 5, ... 36
Tinsley vs. Anderson, 171 U. S. 101, ... 11, 48
Twining vs. New Jersey, 211 U S. 78, ... 23, 24, 54

United States v. Marchant, 25 U. S. 12, ... 51
Urquhart v. Brown, 205 U. S. 179, ... 14, 20
U. S. ex rel. Drury v. Lewis, 200 U. S. 1, ... 20
U. S. ex rel. Kennedy v. Tyler, U. S. Supreme Ct., No. 125 Oct. T. 1925, ... 2, 10, 14. 19
U. S. vs. Brent, Fed. Cases, No. 14,640, ... 52
U. S. vs. Cardish, (D. C. 1906), 145 Fed. 242, ... 53
U. S. vs. Valante, 264 U. S. 563, ... 13, 16
U. S. vs. Worrall, 2 Dallas 384, ... 38

Walker vs. Sauvinet, 92 U. S. 90, ... 28, 62
Wall, Ex parte, 107 U. S. 265, ... 28

Walston v. Nevin, 128 U. S. 578, ... 28
Watkins, Ex parte, 3 Pet. 193, ... 15
West vs. Louisiana, 194 U. S. 258, ... 22, 23
Whitten v. Tomlinson, 160 U. S. 231, ... 11
Wildenhus's case, 120 U. S. 1, ... 15
Williams vs. U. S., 168 U. S. 382, ... 52
Withers vs. Commonwealth, 5 Sergeant & Rawle (Pa. Supreme Ct.), p. 59 (1819), ... 39, 43, 51
Wood, In re, 140 U. S. 278, ... 11

Yarbrough, Ex parte, 110 U. S. 651, ... 15, 51
Young v. Rex, 3 T. R. 106, ... 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925
No. 521

STANLEY P. ASHE, WARDEN OF THE STATE PENITENTIARY FOR THE WESTERN DISTRICT OF PENNSYLVANIA, *Appellant,*

vs.

THE UNITED STATES OF AMERICA EX REL. JOSEPH VALOTTA.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

I

OPINION OF THE COURT BELOW

The opinion delivered by the Court below in this case is reported in 2 Fed. (2d) 735.

II

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

(1) The judgment of the Court herein appealed from was rendered December 19, 1924 (R. 340), and the appeal was allowed on January 5, 1925 (R. 341).

(2) Upon a writ of *habeas corpus* to discharge relator from the custody of a State officer, who detained him by virtue of process issued out of a State Court based upon

conviction of murder, relator claimed that he had been denied his right to due process of law and to the equal protection of the law, as guaranteed under the Fourteenth Amendment to the Constitution of the United States (R.6-7), because of his simultaneous trial on two separate indictments, each charging murder, and because there was no evidence to sustain a verdict of murder in the first degree (R. 6-7).

Relator, having shot and killed H. on a public street, fled immediately, pursued by C., a police officer. Within 100 feet of the place where H. was killed, relator shot and killed C. He was indicted in the State Court for the murder of H.; at a different Number of the same Term, in the same Court, he was indicted for the murder of C. and was tried simultaneously on these two indictments, before the same jury, issue having been joined on each indictment separately. (R. 325-326.)

The lower Court sustained relator's claim and discharged him. (R. 339-340.)

(3) The jurisdiction of this Court on appeal is invoked under Section 238 of the Judicial Code as amended, Act of Congress January 28, 1915, C. 22, Sec. 2, 38 Stat. 803, Comp. Stat. Sec. 1215.

> "Appeals and writs of error may be taken from the district courts * * * direct to the Supreme Court in the following cases: * * * in any case that involves the construction or application of the Constitution of the United States * * * ."

(4) The jurisdiction of this Court on appeal is sustained in—

> *Horn* v. *Mitchell*, 243 U. S. 247.
> *Pothier* v. *Rodman*, 261 U. S. 307.
> *U. S. ex rel. Kennedy* v. *Tyler, U. S. Supreme Court*, No. 125 October T., 1925.

III

STATEMENT OF THE CASE

This appeal is from judgment and order of the United States District Court of the United States for the Western District of Pennsylvania, Thomson J., discharging relator on a writ of *habeas corpus* from the custody of appellant, Warden of the Penitentiary of the State of Pennsylvania, who detained him by virtue of process issued out of the State Court following conviction of murder in the first degree. The history of the case follows:

Joseph Valotta, the relator and appellee, with a companion, about one o'clock A. M., October 30, 1922, met Thomas Hopkins and three companions at the Corner of Freedmore Street and Irwin Avenue, Pittsburgh, Pennsylvania. Some trouble arose between Hopkins and his friends on the one side and Valotta and his friend on the other, the exact nature of which does not appear clearly from the evidence. Hopkins, who was unarmed, called Valotta a "scab" and approached him threatingly. Valotta making no effort to escape, drew his revolver, and while Hopkins was some ten or twelve feet away from him fired a shot into Hopkins heart, killing him instantly. This shot was heard by Couch, a police officer, who was patroling his beat and was a short distance away. He immediately started in the direction from which the shot was fired and, as he approached, Valotta and his companion ran down Freedmore Street pursued by the policeman.

Valotta ran in the shadows of the buildings on the left hand side of Freedmore Street, while the officer ran in the middle of Freedmore Street. The officer gained on Valotta, but did not call on him to stop or announce that he was an officer. When the officer reached the corner of Freedmore and McCullough Streets, where there was a lighted electric street light, being a distance of possibly one hundred and seventy-five feet from the corner of Freedmore Street and Irwin Avenue, the scene of the Hopkins homicide, Valotta, being then about twenty feet in advance of the officer, suddenly fired four shots in quick succession, all of which struck the policeman. At the first shot the officer sank to his

knees, but continuing his pursuit received the remaining three shots and fell mortally wounded some twenty-five feet from the corner of Freedmore and McCullough Streets. Valotta continued his flight and was apprehended a few days later. Couch was in full uniform at the time he was shot (R. 233-234 and 324-326). Two indictments charging murder were found against Valotta, the one for the killing of Couch and the other for the killing of Hopkins, the former being No. 17 and the latter No. 19, February Sessions, 1923, of the Oyer and Terminer Court of the County of Allegheny, Pennsylvania, within which each homicide occurred. The prisoner was arraigned on each indictment and to each he pleaded not guilty and issue was joined. The trial of the defendant on the two indictments before the same jury at the same time was proceeded with without objection on the part of the defendant.

A verdict of murder in the first degree was returned by the jury on the indictment charging the murder of Couch and a verdict of murder in the second degree on the indictment charging the murder of Hopkins (R. 326).

Valotta's defense to the killing of Hopkins was self-defense, contending that Hopkins and his companions who had been strikers in a recent shop strike were about to attack him because he, a workman in the same shop, had refused to strike, but had continued to work. His defense to the killing of Couch was also self-defense, contending that he did not know that Couch was a police officer, but thought that he was one of Hopkins' companions who was pursuing him. There was evidence from which the jury could have concluded that there was sufficient light to enable Valotta to see that Couch was in uniform. The shots were fired with accurate aim, some of which from so short a distance that they left powder marks on the face of Couch (R. 234-235).

Motions in arrest of judgment and for a new trial were made in the Couch case in which he, for the first time, raised the questions afterwards raised on the writ of *habeas corpus* (R. 200 and 224). These motions were overruled by the trial Court. The defendant was sentenced to death and delivered into the custody of the appellant, Warden of the

State Penitentiary, for compliance with sentence. An appeal in the Couch case was taken to the Supreme Court of Pennsylvania, the Court of last resort in that State, in which the main questions now raised were assigned for error. The judgment was affirmed (R. 233-236). Subsequently a petition for a reargument was presented to the Supreme Court of Pennsylvania which was refused.

A writ of *habeas corpus* on petition of Valotta was issued out of the United States Court for the Western District of Pennsylvania directed to appellant as Warden as aforesaid. In an opinion filed the United States District Court ordered that the relator be discharged (R. 323-340) from which judgment this appeal was taken.

IV

SPECIFICATION OF ASSIGNED ERRORS

And now, to wit, December 19th, 1924, comes Stanley P. Ashe, Warden of the State Penitentiary for the Western District of Pennsylvania, respondent above named, and with him the Commonwealth of Pennsylvania appellants herein, by George W. Woodruff, Attorney General of Pennsylvania; by James O. Campbell, First Deputy Attorney General of Pennsylvania; by Samuel H. Gardner, District Attorney of Allegheny County, Pennsylvania; and by Harry A. Estep, First Assistant District Attorney of Allegheny County, Pennsylvania, his attorneys, and having presented his petition for an appeal in the above entitled case files therewith the following assignment of errors upon which he relies to sustain the appeal prayed for:

First: The Court erred in denying the respondent's motion to dissolve the writ of *habeas corpus* issued in this case.

Second: The Court erred in refusing to remand the relator to the custody of respondent.

Third: The Court erred in holding that it had jurisdiction to discharge the relator.

Fourth: The Court erred in finding that the record failed to disclose and that it did not appear that the trial Court exercised its discretion in relation to the right of trying the relator on the said two indictments at the same time, before the same jury.

Fifth: The Court erred in finding that the relator had been deprived of his full and legal right of challenge.

Sixth: The Court erred in finding that the Acts of Assembly of Pennsylvania, and the early decisions of the Courts since 1754, established beyond controversy that a prisoner should not be tried for two distinct felonies before the same jury at the same time.

Seventh: The Court erred in finding that the right of a prisoner to a separate trial on each indictment involving his life is basic, fundamental and absolute and involved in the very conception of free government.

Eighth: The Court erred in finding that the facts in this case practically precluded the existence of a wilful, deliberate and premeditated intent to kill.

Ninth: The Court erred in holding that the relator had been deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Tenth: The Court erred in holding that the trial Court lost its jurisdiction over the relator by the denial of his fundamental right to a separate trial before a separate jury on each indictment against him.

Eleventh: The Court erred in holding that the trial Court's proceedings and its judgment against the relator were null and void, and that the relator is held in custody in violation of the Constitution of the United States.

Twelfth: The Court erred in discharging the relator.

Thirteenth: The Court erred in making the following order:

"And now, to-wit, December 19th, 1924, the foregoing case having come on for hearing, on testimony taken and arguments of counsel, and upon consideration thereof, for the reasons set forth in opinion filed, the relator, Joseph Valotta, is discharged.

W. H. S. THOMSON,
United States District Judge
for the Western District of
Pennsylvania."

And because of other errors appearing upon the face of the record.

WHEREFORE, for these and other manifest errors the said appellants pray that the judgment and order of the District Court of the United States for the Western District of Pennsylvania be reversed and set aside and held for naught, and that the relator be remanded to the custody of the appellants for the purpose of carrying out the sentence of the Trial Court. (R. 342.)

V

SUMMARY OF ARGUMENT

1. The judgment of the trial Court, under which relator was sentenced, having been affirmed by the State Supreme Court and no writ of error having been applied for from this Court, the writ of *habeas corpus* is being employed as a substitute for a writ of error and should be discharged and the prisoner remanded.

The instant case is not within any exceptions to the rule.

Even if the simultaneous trial on two indictments, each charging murder of a different person, deprives defendant of due process of law, it constitutes mere error in point of law, and does not cause loss of jurisdiction by the trial Court.

2. Relator, in connection with his trial and sentence, was accorded all of his constitutional rights.

(1) Matters of procedure are not included within the due process clause of the Constitution.

A. General Rule.

B. and C. This Court has sustained all State laws, statutory or judicially declared, which have come before it, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. A discussion of (B) the case of *Twining v. New Jersey* and cases adjudicated prior thereto, and (C) cases adjudicated subsequent thereto.

The consolidation for trial of two or more indictments, against the same defendant, charging separate and distinct felonies is not prohibited by the due process clause of the Constitution as appears by:

D. Historical Test.

(a) The English rule (b) as adopted in this country is that, while the general rule is that such consolidation will not be permitted over the objection of defendant, its application is in the sound discretion of the trial court, not sub-

ject to demurrer or a cause for arrest of judgment or subject to appeal;

E. Analytical Test. This rule is supported by the decisions of (a) the Pennsylvania Court and (b) the United States Courts;

F. Also supported by the common practice of the people.

(2) Application of the above rules to the instant case.

(3) Defendant is bound by his failure to object to his trial, simultaneously, on the two indictments.

(4) (a) No specific order of consolidation was necessary, it clearly appearing that the State Courts have, in the exercise of their discretion, approved the method followed.

(b) Defendant was not deprived of any right of challenge. The right to any specific number of peremptory challenges, in a trial in a State Court, is not guaranteed by the Federal Constitution.

ARGUMENT

1. THE WRIT OF HABEAS CORPUS CANNOT BE EMPLOYED AS A SUBSTITUTE FOR A WRIT OF ERROR, THEREFORE THE JUDGMENT SHOULD BE REVERSED AND THE WRIT DISCHARGED.

This question is raised by the first, second and third assignments of errors. (R. 342.)

It was raised by appellant before the Court below by motion to discharge the writ and remand the prisoner. (R. 244-246, fourth and seventh reasons.)

The relator was tried, convicted and sentenced by the proper trial Court of Pennsylvania for a murder committed within that State. The judgment of the trial Court was affirmed by the Supreme Court of Pennsylvania, the Court of last resort therein, on January 7, 1924 (R. 233, 236),

and no application was made for a writ of error to remove the cause to this Court. Subsequently a motion for reargument was presented to the Supreme Court of Pennsylvania, which was refused on October 6, 1924. (R. 236.) The petition for writ of *habeas corpus* was filed in the United States District Court, October 15, 1924 (R. 3), and the writ issued same day. (R. 239.)

In the case of *United States ex rel. Kennedy* vs. *Tyler*, No. 125 October Term, 1925 (October 12, 1925), this Court reviewed and reaffirmed the cases, holding that the writ of *habeas corpus* cannot be employed as a substitute for a writ of error.

In that case the relators had been, by the supreme court of the State of New York, adjudged guilty of contempt for disobeying its order prohibiting certain action with reference to land within an Indian reservation.

A writ of *habeas corpus* was issued out of the Federal District Court for the Western District of New York based upon an allegation that relators had been denied the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. The court below exercised its discretion in issuing the writ principally on the ground that relators, being Seneca Indians, were wards of the Nation and entitled to the protection of the federal courts.

The Federal Court decided the matter on its merits and dismissed the writ.

This Court affirmed the judgment of the lower Court but states that the writ should have been discharged because the case did not come within the class of cases in which that writ lies to review the action of a State court of last resort, rather than upon the merits.

In its opinion this Court says:

> "* * * In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions (treaty or constitutional rights) should first be exhausted. When that has been done, the authority of this court may be invoked to protect a

party against any adverse decision involving a denial of a federal right properly asserted by him.

"The rule has been firmly established by repeated decisions of this court that the power conferred on a federal court to issue a writ of *habeas corpus* to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist. *Ex parte Royall,* 117 U. S. 241, 250-253; *In re Wood,* 140 U. S. 278, 289; *In re Frederich,* 149 U. S. 70, 77-78; *New York* v. *Eno,* 155 U. S. 89, 98; *Whitten* v. *Tomlinson,* 160 U. S. 231, 240-242; *Baker* v. *Grice,* 169 U. S. 284, 290; *Tinsley* v. *Anderson,* 171 U. S. 101, 104-105; *Davis* v. *Burke,* 179 U. S. 399, 401-403; *Riggins* v. *United States,* 199 U. S. 547, 549; *Drury* v. *Lewis,* 200 U. S. 1, 6; *Glaskow* v. *Moyer,* 225 U. S. 420, 428; *Johnson* v. *Hoy,* 227 U. S. 245, 247."

(a) *Rule Applied.*

The general rule that the writ of *habeas corpus* cannot be utilized for the purpose of proceedings in error or as a substitute for a writ of error has also been applied in the following cases:

Goto vs. *Lane,* 265 U. S. 393, 401, 402. This case arose on appeal from the District Court of Hawaii refusing a writ of *habeas corpus* to release appellants from custody under a conviction in a territorial court on an indictment for an infamous crime in which certain constitutional questions arose regarding the decision of the trial court with reference to alleged changes in the indictment without resubmission to the grand jury. Affirmed.

Frank vs. *Mangum,* 237 U. S. 309, in which this Court was asked to issue a writ of *habeas corpus* for the reason that the trial court had lost jurisdiction because of mob

domination; also for the reason that petitioner had been convicted without due process of law because the verdict was received in his absence, the supreme court of Georgia having held that petitioner's waiver of his right to be present when the verdict was received was valid.

The following is a summary of this case found in the case of *Filer* vs. *Steele,* 228 Fed. 242, 245 (affirmed *per curiam,* 241, U. S. 648):

> "First. Under the terms of section 753 of the Revised Statutes, in order to entitle the applicant to the relief sought under writ of habeas corpus, it must appear that he is held in custody in violation of the Constitution of the United States. Second. That he cannot have relief on habeas corpus if he is held in custody by reason of conviction upon a criminal charge before a court having jurisdiction over the subject-matter of the offense, the place where it was committed and the person of the prisoner. Third. Mere errors of law, however serious, committed by the court in the exercise of its jurisdiction, cannot be reviewed by habeas corpus. The writ cannot be employed as a substitute for a writ of error. Fourth. A criminal prosecution in the courts of a state, based on a law not repugnant to the federal Constitution and conducted according to the settled course of proceedings under the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process of law' in the constitutional sense. * * *"

McMicking vs. *Schields,* 238 U. S. 99, 106, 107. The trial court in the Philippine Islands refused defendant time to prepare for trial on a criminal charge, although the law provided for two days, if requested. The Supreme Court of the Philippine Islands discharged defendant on *habeas corpus.* Reversed. This Court says:

> "Mere errors in point of law, however sericus, committed by a criminal court in the exercise of its juris-

diction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error. * * *"

Riddle vs. *Dyche,* 262 U. S. 333. This was an appeal from an order of the District Court of the United States for the Northern District of Georgia, refusing to release petitioner under a writ of *habeas corpus* from custody to which he had been committed, after conviction of a felony, by the District Court of the United States of the Northern District of Alabama. Affirmed.

The syllabus reads as follows:

"Habeas corpus will not lie to secure the release from custody of one convicted by a jury of less than twelve men where the record upon its face shows that a legal jury was empaneled, sworn, and charged, and no attempt was made to review the question by writ of error."

On pages 336, 337 this Court says:

"Whatever may be the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal,—one not acting in the exercise of appellate power."

Craig vs. *Hecht,* 263 U. S. 255, 277. Craig, being adjudged in contempt of court in a federal district court, instead of taking an appeal obtained his discharge on a writ of *habeas corpus.* Reversed and prisoner remanded.

United States vs. *Valante,* 264 U. S. 563, 564. Valante, having been convicted of a misdemeanor in a federal district court and no appeal having been taken, was discharged from custody on a writ of *habeas corpus* for the reason that the verdict was received and sentence imposed by a judge

other than the one who presided at the trial. Reversed. Writ discharged and prisoner remanded.

Matter of Spencer, 228 U. S. 652, 659, 660. The crime for which relator was detained was committed in 1910, at which time under the law of Pennsylvania an indeterminate sentence of imprisonment was provided with a maximum of two years and a minimum of not more than six months. In 1911 the law was changed so that the minimum sentence of imprisonment for this offense was eighteen months. Relator was tried in 1912 and sentenced under the Act of 1911 to imprisonment of not more than two years and not less than eighteen months. It was alleged that the Act of 1911 was an *ex post facto* law, and that relator had been deprived of due process of law as guaranteed under the Fourteenth Amendment. Writ discharged. Affirmed.

Urquhart v. *Brown,* 205 U. S. 179, 181, 183. Relator was committed by a state court without further trial or hearing upon a verdict of a jury that he was not guilty of a criminal charge by reason of insanity.

The principle of the rule applies as well after decision in the state courts as before.

Matter of Spencer, supra, 660.
Glasgow v. *Moyer,* 225 U. S. 420, 428.

(b) *Instant Case not Within Exceptions to the Rule.*

In *United States ex rel Kennedy* vs. *Tyler, supra,* This Court classifies the exceptions to the above rule as follows:

> "This general rule is emphasized by a consideration of the few cases where this court has upheld the allowance of the writ. They were all cases of exceptional urgency. Such, for example, were *In re Neagle,* 135 U. S. 1, where a deputy marshal of the United States was discharged on *habeas corpus* from state custody on a charge of homicide committed in the performance of his duty to guard and protect a justice of this court; *In re Loney,* 134 U. S. 372, where petitioner, charged with perjury in testimony given in a contested congres-

sional election case, was discharged upon the ground that to permit him to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal; and *Wildenhus's case,* 120 U. S. 1, where a member of the crew of a foreign merchant vessel was discharged from the custody of the state because the arrest was contrary to the provisions of an international treaty. Thus, it will be seen, two of these cases involved interferences by the state authorities with the operations of departments of the general government, and the other concerned the delicate relations of that government with a foreign nation."

In *Goto* vs. *Lane, supra,* 401, 402, this Court says with reference to this writ and the exceptions:

"* * * The remedy is an extraordinary one, out of the usual course, and involves a collateral attack on the process or judgment constituting the basis of the detention. The instances in which it is granted, when the law has provided another remedy in regular course, are exceptional, and usually confined to situations where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void.

"This case does not measure up to that test. The circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject-matter and of their persons, and the sentence imposed was not in excess of its power. The offense charged was neither colorless nor an impossible one under the law. The construction to be put on the indictment, its sufficiency, and the effect to be given to the stipulation, were all matters the determination of which rested primarily with that court. If it erred in determining them, its judgment was not, for that reason, void (Ex parte Watkins, 3 Pet. 193, 203, * * * ; Ex parte Parks, 93 U. S. 18, 20, * * *; Ex parte Yarbrough, 110 U. S. 651, 654, * * *), but subject to correction in regular course on writ of error. If the questions pre-

> sented involved the application of constitutional principles, that alone did not alter the rule. Markuson *v.* Boucher, 175 U. S. 184, * * *. And if the petitioners permitted the time within which a review on writ of error might be obtained to elapse, and thereby lost the opportunity for such a review, that gave no right to resort to habeas corpus as a substitute. Riddle *v.* Dyche, 262 U. S. 333, * * *. And see Craig *v.* Hecht, 263 U. S. 255, ante, 293, * * *."

The instant case is clearly not within any of these exceptions. The reason given by the Court below for refusing to dismiss the writ and for discharging the prisoner is summed up in the following (R. 339, 340):

> "Jurisdiction of the subject-matter of the offense, the place where it was committed, and the person of the prisoner, the trial Court undoubtedly had. But this jurisdiction was lost by the denial of the prisoner's fundamental right to a separate trial before a separate jury on each indictment against him. Being thus denied that due process of law guaranteed to every citizen under the Constitution, it follows that the Court's proceedings and judgment against him, were null and void, and the relator is held in custody in violation of the Constitution of the United States."

Even if the Fourteenth Amendment does guarantee to relator a separate trial before a separate jury on each indictment against him, the denial of that right during the course of his trial did not constitute a loss of the jurisdiction of the trial Court over him or over either of the offenses charged. It constituted mere error in point of law, subject to correction in regular course on writ of error. The case does not for that reason come under any of the exceptions to the general rule that the writ of *habeas corpus* cannot be substituted for a writ of error.

In *United States* vs. *Valante, supra,* defendant contended that he had been denied his constitutional right to trial by

jury and attempted to raise that question on a writ of *habeas corpus.*

This Court says (p. 564):

> "* * * Without intimating that there is anything of substance in this contention, it is clear that the error, if any was committed, did not go to the jurisdiction of the court, or render the judgment void, but was at the most, one which could have been corrected on a review by a writ of error. * * *"

In *Matter of Spencer, supra,* 661, this Court, without deciding whether or not the statute, under which sentence was imposed, was *ex post facto,* dismissed the petition for a writ of *habeas corpus,* on the ground that the proper course to pursue in raising the question was by appeal.

In *Glasgow* v. *Moyer,* 225 U. S. 420, 428, appellant sought discharge from confinement after sentence by a United States District Court on the ground, inter alia, that the statute under which he had been convicted was an *ex post facto* law, and that he had been deprived of his liberty without due process of law.

This Court held that even if such allegations be accepted as true he could not be discharged on writ of *habeas corpus* because those questions must be raised on writ of error.

Markuson v. *Boucher,* 175 U. S. 184, 185, 186, was an appeal from a United States District Court discharging a writ of *habeas corpus* issued on behalf of a person imprisoned under commitment by a state court.

The petition alleged that the statutes under which the prisoner was committed were in violation of the Fourteenth Amendment to the Constitution of the United States.

This Court, after reciting the fact that these constitutional questions had been argued at length, says:

> "We are not disposed to consider them. We have frequently pronounced against the review by *habeas corpus* of the judgments of the state courts in criminal cases, because some right under the Constitution of

> the United States was alleged to have been denied the person convicted, and have repeatedly decided the proper remedy was by writ of error."

Cited with approval in *Goto* v. *Lane, supra,* 402.

In *Ex parte Parks,* 93 U. S. 18, 23, a writ of *habeas corpus* was sought to discharge prisoner convicted of forgery in a United States Court because the act for which he was convicted was not a crime against the laws of the United States.

Held that whether the judgment was erroneous or not, it was not void because the trial court had jurisdiction and power to convict and sentence, and that, therefore, the writ could not issue to correct a mere error.

That the trial Court did not lose jurisdiction in the instant case by permitting the trial of realtor on the two indictments simultaneously is further illustrated by a consideration of the cases in which it has been held that judgments of trial courts were void and that, therefore, the writ of *habeas corpus* would lie.

In *Ex parte Lange,* 18 Wall. 163, the court undertook to impose a second punishment when it had exhausted its power in imposing one of the alternative penalties fixed by the applicable statute.

In *In re Snow,* 120 U. S. 274, the record disclosed that it was sought to impose a second punishment for the same offense.

In *Ex parte Bain,* 121 U. S. 1, the indictment had been amended without its re-submission to the grand jury.

In *In re Nielsen,* 131 U. S. 176, the court had exceeded its authority in undertaking to pass the particular sentence imposed.

In each of the four last cited cases the court from whose sentence the discharge was sought was either a United States Court or a territorial court.

In *Ex parte Siebold,* 100 U. S. 404, *Ex parte Royall,* 117 U. S. 241, and *Henry* v. *Henkel,* 235 U. S. 219, while the

writ was dismissed, this Court stated that where the offense charged is not such under the common law or a statute or where the statute under which sentence is imposed is unconstitutional the judgment may be reviewed on *habeas corpus.*

Frank v. *Mangum, supra,* and *Moore* v. *Dempsey,* 261 U. S. 86, involved an allegation that the trial court (a state court) had been dominated by a mob, and in each it was held that if such allegations were sustained by the evidence the trial court had lost jurisdiction for that reason and that, therefore, the writ of *habeas corpus* would lie.

The poverty of relator was alleged in the court below as a reason sustaining the writ in this case, but that does not create an exception to the rule.

> "Something is said in the opinion of the court below to the effect that the relators pleaded lack of ability to bear the expense of proceedings for their protection in the state courts or to furnish bonds required on appeal. We are unable to find anything in the record to support this claim, but even if it were true it would afford no basis for a different conclusion. *Markuson* v. *Boucher,* 175 U. S. 184, 185, 187."
>
> *United States ex rel. Kennedy* vs. *Tyler, supra.*

(c) *Reasons for Non-interference with State Courts.*

The reasons given by this Court for non-interference by the United States Courts under a writ of *habeas corpus* with the custody by the State Courts of one charged therein with crime, either before or after conviction, unless the case comes within some of the exceptions above noted, are as follows:

> "* * * It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the Federal

court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, * * *."

United States ex rel. Drury v. *Lewis*, 200 U. S. 1, 7. *Urquhart* v. *Brown*, 205 U. S. 179, 183.

"* * * More than this, that for which petitioners contend, will make unstable and uncertain the administration of the criminal laws of the states. If defenses may be omitted at trials, rights of review omitted, and yet availed of through habeas corpus, the whole course of criminal justice will be deranged, and, it may be, defeated. * * *"

Matter of Spencer, supra, 660, 661.

These comments are particularly applicable in the instant case. The trial was reviewed first by the trial Court in Banc, consisting of three judges, and later by the Supreme Court of the State, consisting of seven judges, all of whom held that the trial, conviction and sentence were without error. The judgment of these ten judges, learned in the law, has been set at naught by one United States district judge and the Sovereign State of Pennsylvania has been deprived of its right to administer its criminal law and to enforce that law against this man, who has killed two of its citizens in cold blood.

We, therefore, submit that the State Court in which relator was committed had jurisdiction of the subject-matter and of his person, and the sentence imposed was not in excess of its power; that the offense was neither colorless nor an impossible one under the law; that nothing transpired during or since the trial which caused the trial Court to lose its jurisdiction over either the subject-matter or the person of relator; and that, therefore, the judgment of the Federal Court should be reversed, the writ of *habeas corpus* discharged and the prisoner remanded to the proper officials of the State of Pennsylvania for compliance with the sentence of its Courts.

2. DUE PROCESS OF LAW WITHIN THE TERMS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Court below has found that the trial of relator on two separate and distinct indictments before the same jury at the same time was unlawful according to the established law of Pennsylvania (R. 328-335), and that the State, in so trying him, denied to him the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 337-339.)

The correctness of these findings is raised by the sixth, seventh, ninth, eleventh, twelfth and thirteenth assignment of errors. (R. 342.)

In as much as the Supreme Court of Pennsylvania has decided that relator's trial was according to the established law of Pennsylvania and has affirmed the judgment (R. 233-236), we take it that that question is settled, unless such procedure was not due process of law as guaranteed by the Constitution of the United States, or unless in its application to his case relator was denied the equal protection of the law.

Bonner vs. *Gorman,* 213 U. S. 86, 91.

Kryger vs. *Wilson,* 242 U. S. 171, 176.

We contend that the trial and sentence of Joseph Valotta was according to law and in accord with the settled forms of criminal procedure within the Commonwealth of Pennsylvania, and that the defendant was accorded, in connection with his trial and sentence, all the rights guaranteed to him by the Constitution of the United States and the Constitution of Pennsylvania.

In the consideration of these questions we propose to discuss, first, due process of law within the terms of the Fourteenth Amendment with relation to procedural matters generally; second, whether or not the consolidation of indictments for separate and distinct felonies is prohibited as not constituting due process of law and thereunder

(a) the historical test; (b) the analytical test; and (c) the common practice of the people; and third, the application of the rules and practice, thus found to have been established, to the consolidation of the indictments in the instant case, and in connection therewith, the question of the equal protection of the laws.

(1) *Matters of Procedure are not Included within the Due Process Clause of the Constitution.*

A. General Rule.

> "Generally, whatever matters are jurisdictional are essential and protected by the Constitution; matters which do not affect the competency of the court are not jurisdictional and are not protected."
> *McGehee's Due Process of Law*, p. 165.

The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law.

The State has full control over the procedure in its courts, both in civil and in criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights.

> *Brown* vs. *New Jersey*, 175 U. S. 172, 175.
> *West* vs. *Louisiana*, 194 U. S. 258, 263.

In *Brown* vs. *New Jersey*, supra, the main question involved was the reduction of peremptory challenges under an Act providing for a struck jury. In *West* vs. *Louisiana*, supra, numerous questions were raised, including the admission of a deposition of an absent witness against the defendant in a criminal trial.

In the case of *Leeper* vs. *Texas*, *139 U. S. 462*, one of the errors assigned was the admission of testimony of other distinct offenses committed near the scene of the murder and immediately afterwards.

The Supreme Court says (page 467):

> "It must be regarded as settled. * * *. That by the

Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. * * *"

The United States Supreme Court has always declined to give a comprehensive definition of the phrase "due process of law", and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise.

Twining vs. *New Jersey*, 211 U. S. 78.

In determining whether or not any particular right as claimed is within the protection of the due process clause, two tests are to be applied: The first, the historical test—Was such a right brought to this country at the time of the immigration and applied and exercised by our forefathers up to the time of the revolution; the second, the analytical test—Has such right been continued and upheld by our courts as a continuing expression of the consciousness of the people, or has it been changed to meet the changing situation and circumstances in the development of the law?

Professor McGehee, in his *"Due Process of Law,"* treating of these tests, says (p. 57):

"But in the recognition of 'fundamental principles' apart from constitutional provisions, the courts, true to the method which has built up the common law, base their decisions less on deductive reasoning from *a*

> *priori* assumptions, than on the recognition of rights which have been asserted at a definite time and place against particular acts of tyranny and have become embedded in our law. * * *"

Speaking of the first test—Is the matter or practice under discussion found to be or not to be in the law and usage in England before the Declaration of Independence and in this country since it became a nation, in similar cases? Professor McGehee, on page 54, says:

> "If a particular procedure is found to have been sanctioned by English practice and adopted as suited to the conditions in this country, it measures up to the requisites of due process; but if the inquiry has only negative results, we must not immediately conclude that due process is wanting.
>
> "* * * To hold every procedure not fulfilling these requirements to be a deprivation of due process, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. * * *"
>
> Citing *Hurtado* vs. *Cal.*, 110 U. S. 516.

B. *Twining* vs. *New Jersey* and Preceding Cases.

In a consideration of cases to determine what is "due process of law" under the process of inclusion and exclusion, we start with *Twining* vs. *New Jersey, supra,* which contains a comprehensive review thereof.

In that case the question was: Is exemption from self-incrimination safeguarded as against state action by the due process clause of the Fourteenth Amendment?

In that opinion Mr. Justice Moody laid down three conclusions as follows (211 U. S. 79, 100, 101):

> "First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their

civil and political condition by having been acted on by them after the settlement of this country. * * *

"Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, 'would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' * * *

"Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right and guard him against the arbitrary action of government. * * *"

After showing that there is abundant evidence that the right of exemption from self-incrimination was not a part of the law of the land of England prior to the emigration to this country, the court states that it prefers to rest its decision on broader grounds than the first conclusion above stated "and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process," and proceeds (p. 1061):

"Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of the citizen of such a government? * * * In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves

> by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. * * *"

In approaching the discussion of this question the following excerpts from the opinion of Mr. Justice Moody in this case of *Twining* vs. *New Jersey*, as found on page 106 of 211 U. S. are pertinent:

> "* * * We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations. * * *"

The opinion then proceeds (p. 110) to review cases dealing with this principle which must be observed in the trial of civil and criminal causes, first remarking that—

> "The decisions of this Court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. * * *"

The Court finds that due process requires that the court which assumes to determine the rights of parties shall have jurisdiction; that there shall be notice and opportunity for hearing given the parties; also that, subject to these

two fundamental conditions, the Court has sustained all State laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. (P. 111.)

> "Among the most notable of these decisions are those sustaining the denial of jury trial, both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. * * *"

Justice Moody sums up the cases as follows (pp. 111, 112, 113):

> "* * * The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with. * * * It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed, the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in Hurtado *vs.* California and Maxwell *v.* Dow, was historically and in principle much stronger. * * *
>
> "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it can not be ranked with the right to hearing before

condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. * * *"

The following extracts supplement the references to adjudicated cases as found in *Twining* vs. *New Jersey,* supra:

In the case of *Holden* vs. *Hardy,* 169 U. S. 366, 384-388; the Court had under consideration the Constitutionality of a State law restricting the length of the day at which men could work in a coal mine to eight hours.

In a review of cases defining the Fourteenth Amendment, the Court says (pp. 384-388):

"* * * Thus in *Walker* v. *Sauvinet,* 92 U. S. 90, which was an action brought by a colored man against the keeper of a coffee-house in New Orleans for refusing him refreshments in violation of the Constitution of the state securing to the colored race equal rights and privileges in such cases, a statute of the state provided that such cases should be tried by jury, if either party demanded it, but if the jury failed to agree the case should be submitted to the judge, who should decide the same. It was held that a trial by jury was not a privilege or immunity of citizenship which the states were forbidden to abridge, but the requirement of due process of law was met if the trial was had according to the settled course of judicial proceedings. 'Due process of law,' said Chief Justice Waite, 'is process due according to the law of the land. This process in the states is regulated by the law of the state.' This law was held not to be in conflict with the Constitution of the United States.

"Similar rulings with regard to the necessity of a jury, or of a judicial trial in special proceedings, were made in *Kennard* v. *Louisiana, Morgan,* 92 U. S. 480; *McMillan* v. *Anderson* 95 U. S. 37; *Davidson* v. *New Orleans,* 96 U. S. 97; *Walston* v. *Nevin,* 128 U. S. 578; *Ex parte Wall,* 107 U. S. 265.

"In *Hurtado* v. *California,* 110 U. S. 516, it was held that due process of law did not necessarily require an

indictment by a grand jury in a prosecution by a state for murder. The Constitution of California authorized prosecutions for felonies by information, after examination and commitment by a magistrate, without an indictment by a grand jury, in the discretion of the legislature. It was held that conviction upon such an information, followed by sentence of death, was not illegal under the 14th Amendment.

"In *Hayes* v. *Missouri*, 120 U. S. 68, it was held that a statute of a state which provided that, in capital cases, in cities having a population of over 100,000 inhabitants, the state shall be allowed fifteen peremptory challenges to jurors, while elsewhere in the state it was allowed only eight peremptory challenges, did not deny to a person tried for murder, in a city containing over 100,000 inhabitants, the equal protection of the laws enjoined by the 14th Amendment, and that there was no error in refusing to limit the state's peremptory challenges to eight.

"In *Missouri P. Railway Co.* v. *Mackey*, 127 U. S. 205, it was said that a statute in Kansas abolishing the fellow-servant doctrine as applied to railway accidents, did not deny to railroads the equal protection of the laws, and was not in conflict with the 14th Amendment. The same ruling was made with reference to statutes requiring railways to erect and maintain fences and cattle guards, and make them liable in double the amount of damages claimed for the want of them.

"In *Hallinger* v. *Davis*, 146 U. S. 314, it was held that a state statute conferring upon an accused person the right to waive a trial by jury and to elect to be tried by the court, and conferring power upon the court to try the accused in such case, was not a violation of the due process clause of the 14th Amendment.

"So, in *Re Kemmler*, 136 U. S. 436, it was held that the law providing for capital punishment by electricity was not repugnant to this Amendment. And in *Duncan* v. *Missouri*, 152 U. S. 377, it was said that the prescribing of different modes of procedure and the abolition

of courts, and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds persons accused of crime, are not considered within the constitutional inhibition. See also *Re Medley, Petitioner,* 134 U. S. 160, and *Holden* v. *Minnesota,* 137 U. S. 484.

"An examination of both these classes of cases under the 14th Amendment will demonstrate that, in passing upon the validity of state legislation under that Amendment, this court has not failed to recognize the fact that the law is to a certain extent a progressive science; that in some of the states methods of procedure which, at the time the Constitution was adopted, were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes in this country, at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies let it be said, that so oppressive a doctrine had never obtained a foothold there.

"The present century has originated legal reforms of no less importance. The whole fabric of special pleadings, once thought to be necessary to the elimination of the real issue between the parties, has crumbled

to pieces. The ancient tenures of real estate have been largely swept away, and land is now transferred almost as easily and cheaply as personal property. Married women have been emancipated from the control of their husbands and placed up a practical equality with them with respect to the acquisition, possession, and transmission of property. Imprisonment for debt has been abolished. Exemptions from execution have been largely added to, and in most of the states homesteads are rendered incapable of seizure and sale upon forced process. Witnesses are no longer incompetent by reason of interest, even though they be parties to the litigation. Indictments have been simplified, and an indictment for the most serious of crimes is now the simplest of all. In several of the states grand juries, formerly the only safeguard against a malicious prosecution, have been largely abolished, and in others the rule of unanimity, so far as applied to civil cases, has given way to verdicts rendered by a three-fourths majority. This case does not call for an expression of opinion as to the wisdom of these changes, or their validity under the 14th Amendment, although the substitution of prosecution by information in lieu of indictment was recognized as valid in *Hurtado* v. *California*, 110 U. S. 516. They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

"Of course, it is impossible to forecast the char-

acter or extent of these changes, but in view of the fact that, from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employees, as they arise.

"Similar views have been heretofore expressed by this court. Thus in the case of *Missouri* v. *Lewis,* 101 U. S. 22, 31 it was said by Mr. Justice Bradley: 'We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the 14th Amendment, be a denial to any person of the equal protection of the laws, * * * The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the 14th Amendment, there is no solid reason why there may not be such diversities in different parts of the same state'.

"The same subject was also elaborately discussed by Mr. Justice Matthews in delivering the opinion of this court in *Hurtado* v. *California,* 110 U. S. 516, 530: 'This flexibility and capacity for growth and adapta-

tion is the peculiar boast and excellence of the common law. * * * The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. * * *,"

A denial of due process of law cannot be founded on the admission of the deposition of an absent witness against the defendant in a criminal trial, although by the common law the evidence may be inadmissible.

West vs. *Louisiana,* 194 U. S. 258, 260, 261.

In *Leeper* vs. *Texas,* 139 U. S. 462, 467, 468, one of the errors assigned was the admission of testimony of other distinct offenses committed near the scene of the murder and immediately afterwards.

Held to be a matter to be determined by the State and not within the protection of the due process clause of the Fourteenth Amendment.

C. Cases Adjudicated since *Twining* vs. *New Jersey, Supra.*

Garland v. *Washington,* 232 U. S. 642, was in error to the Supreme Court of the State of Washington to review a judgment affirming a conviction of larceny. It appeared the defendant had been convicted upon an information charging the larceny of $1,000.00. A new trial was granted; a new information filed charging the larceny of "a check payable for the sum of $1,000.00 in money" upon which he was tried and convicted, but as to which it appeared he had not been arraigned or to which he had not pleaded. He raised these questions in general objections to the introduction of evidence, for the reason that he could not be tried on that information; but did not specifically raise the question of arraignment and plea.

Held that he had not been deprived of due process of law.

In the opinion by Justice Day the Court says (p. 645):

> "Due process of law * * * does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers *v.* Peck, 199 U. S. 425, 435, * * * and previous cases in this court there cited . Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage. * * *"

Frank v. *Mangum*, 237 U. S. 309, 311, was an appeal from the District Court of the United States for the Northern District of Georgia to review a decree denying a petition for a writ of habeas corpus in behalf of one convicted in the State Court of first degree murder. The main reason advanced as error was based upon the contention that the trial court had been dominated by a mob to such an extent that it had lost jurisdiction.

But is was also contended that the relator had been denied due process of law, because the verdict had been received in his absence. The State Court had held that this right had been waived by him and that such waiver was valid (p. 316); also that he had failed to raise such question on his motion for a new trial and it was afterwards too late.

As to these later reasons this Court says (p. 326):

> "As to the 'due process of law' that is required by the 14th amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. * * *"

And with reference to the failure to include in his motion for new trial, his absence when the verdict was rendered, this Court says (pp. 339, 340):

> "* * * There is nothing in the 14th Amendment to prevent a state from adopting and enforcing so reasonable a regulation of procedure. * * *
>
> "* * * But repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the 14th amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal, are not interfered with. * * *"

In the *Matter of Walter Peterson,* 253 U. S. 300, 309, 310, the opinion states with reference to the 7th Amendment:

> "* * *That 'the (statement the) right of trial by jury shall be preserved' does not require that old forms of practice and procedure to be retained. * * * It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. * * * "

This was a case in the United States Courts involving the validity of an appointment of an auditor in an action at law, to simplify and clarify the issues and make tentative findings of fact.

Due process of law does not require a state to adopt any particular form of procedure, so long as it appears that accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.

Garland v. *Washington,* 232 U. S. 642.

(Want of formal arraignment in error to State court.)

D. Consolidation of Indictments—Historical Test.

(a) The English Rule.

Neither Magna Carta nor any of the other great charters included any provision for protection against the consolidation for trial of two or more indictments against the same defendant or against the joinder within the same indictment of two or more counts for separate and distinct offenses.

Chapter 39 of Magna Carta provides:

> "* * * 'No freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.' * * *"

The main object of this chapter has been expressed as follows:

> "* * * '*It forbade him (John) for the future to place execution before judgment.*' McKechnie, Magna Carta, p. 439. * * *"
>
> *Taylor's Due Process of Law*, Sec. 4, pp. 4, 5.

In *Young* v. *Rex*, 3 T. R. 106, Buller, Justice, says that where different felonies are included in the same indictment, the judge may quash the indictment, lest it should confound the prisoner in his defense; but these are only matters of prudence or discretion.

> "In cases of felony, no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to

elect on which charge he will proceed." "But," the author adds, "this in only matter of prudence and discretion which it rests with the judges to exercise."

Chitty's Criminal Law. Vol. 1, pp. 252, 253.

"If different felonies or misdemeanors be stated in several counts of an indictment, no objection can be made to the indictment on that account in point of law. In cases of felony, indeed, the judge, in his discretion may require the counsel for the prosecutor to select one of the felonies, and confine himself to that. This is what is technically termed putting the prosecutor to his election. But this practice has never been extended to misdemeanors."

Archbold, 8th ed., chap. 3, p. 95.

In *Roscoe's Criminal Evidence,* 8th Am. ed. 206, the author, after observing that there was no objection in point of law to inserting, in *separate* counts of the same indictment, several distinct felonies of the same degree and committed by the same offender, and that such joinder was not a ground for arrest of judgment, says:

"In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment, or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed."

"* * * The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may, therefore, be likely to embarrass the prisoner in his defense."

Erskine, J., in *Reg* v. *Trueman,* 8 Car. & P. 727.

The above extracts from *Young* v. *Rex, Chitty's Criminal Law, Archbold, Roscoe's Criminal Evidence* and *Reg.* v. *Trueman,* are taken from *Pointer* v. *United States,* 151 U. S. 396, 401, 402.

"* * * But every separate count charges the de-

fendant as if he had committed a distinct offense, because it is upon the principle of the joinder of offenses, that the joinder of counts is admitted: 1 Chit. Crim. L. 249. In point of law, there is no objection to the insertion of several distinct felonies of the same degree, though committed at different times, in the same indictment against the same offender: Id. 253. * * *"

Campbell v. *State*, (Tenn. 1836) 9 Yerger, 333, 30 Am. Dec. 417.

These rules were rules of practice. Whether or not they should be applied in any particular case was within the sound discretion of the court. They did not belong to the due process of the law.

In summing up these common law rules Mr. Justice Harlan, in *Pointer* v. *United States*, supra. p. 403, says:

"* * * The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. * * *"

(b) The Rule as Adopted in this Country.

Our States, and indeed our Colonies, in adopting the common law of England, did not adopt all of its procedural requirements.

"Each colony judged for itself what parts of the common law were applicable to its new condition, and in various modes by legislative acts, by judicial decisions, or by constant usage, adopted some parts and rejected others."

United States v. *Worrall, 2 Dallas 384.*

Even if protection against the consolidation of indict-

ments was developed in the common law of England, it was not incorporated in the various State Constitutions nor in the common law of the States in the broad sense of prohibiting such consolidation in a proper case. This seems to be established by the decision of Chief Justice Gibson in *Withers* vs. *Commonwealth*, 5 Sergeant & Rawle (Pa Supreme Ct.), p. 59 (1819), an authority on the common law at a time comparatively near the time of the adoption of the American Constitutions, holding that indictments for misdemeanors could be consolidated. His decision was based upon the fact that misdemeanors could be joined in several counts of the same indictment and that in the case of felonies, while the rule was that an indictment could be quashed or an election required upon motion for misjoinder where two or more felonies were combined in the same indictment, yet the matter was practically within the discretion of the trial court, no appeal lying to its refusal to quash or require an election.

In the case of *Withers* vs. *Commonwealth, supra,* Augustus Withers, plaintiff in error, and Joseph Withers were indicted in one indictment for conspiring against and cheating one Hickman, and the same defendants in the court below were indicted for conspiring against and cheating one William Thomas. These indictments were consolidated and tried by the same jury at the same time without the consent of the plaintiff in error and after he had expressly objected thereto.

It was argued by the Commonwealth that the combining of these two indictments was like combining two offenses in different counts of the same indictment, for which there were many authorities. (*Rex* vs. *Benfield,* 2 Burr, 984; 1 Hale's Pleas of the Crown, 560, 561; Cowp. 325; 1 Chitty's Criminal Law 296; 2 Hale 174. Also that in cases of felony it is a matter of prudence and discretion in the judges to admit several felonies to be charged in one indictment; that the evidence in these cases was applicable to each indictment, by way of corroboration, and to show the intent.

In sustaining the conviction at January Term, 1819, the Court, Gibson, J., says:

"I have found no case exactly like the present; but there is a strong analogy between it and those in which several counts for separate and distinct offenses are included in the same indictment: for these are necessarily tried together; and, in cases of misdemeanor, it has never been held that separate offenses could not be joined. As to felonies, a different rule prevails, and the Court goes so far as to quash where distinct offenses are charged; or if no motion for that purpose be made in time, to compel the prosecutor to select a particular offense, to which alone, the prisoner is held to answer. But in no case has such joinder been considered a cause of demurrer, or ground for a motion in arrest of judgment, but merely as a subject for the discretion of the Court, and, therefore, not a matter in which error could be assigned in a superior Court. The only solid reason for the distinction in regard to felonies, is, that the prisoner, having a right to challenge peremptorily, may choose to have a particular juror to try one of the offenses, and yet be altogether averse to him with regard to the other; and thus if the Court did not interefere, he would in some measure lose the benefit of his right. With us, this reason applies also to misdemeanors—as a defendant may peremptorily challenge four jurors; but whether a Court would therefore quash an indictment comprising two or more misdemeanors, would, I apprehend, depend on a sound exercise of discretion, having regard to the particular circumstances of each case: * * *. In the present case, the prisoner was allowed his challenges on each indictment, and has therefore no ground for complaint. But had it been otherwise, we could view these two charges only as if they had been included in the same indictment. It would therefore seem that the Court, by whom they were tried, were the only Judges of the proper exercise of their own discretion; and that an abuse of discretion, even if it existed, would not be the subject of error. * * *"

The case of *Regina* vs. *Giddins, Car. & Mar.*, p. 634, as

cited by the Court below (R. 330-331), is not to the contrary of our position, as there the charge of robbing two men included in one count was sustained, there being no interval of time between the two crimes. In other words, they were very closely related as were the two murders in the instant case.

"These several charges, as laid in the indictment, are different modes of laying the same offence. But if the offences were different, separate offences, it is no objection either on demurrer or in arrest of judgment that separate offences of the same nature, are joined against the same defendant. Even in case of felony, though it be true that no more than one offence should regularly be charged, in one indictment, and that the Court would quash the indictment before plea or if on the trial, the Court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed, yet even in felonies, there is no objection to the insertion of several distinct offences of the same degree, though committed at different times, in the same indictment against the same offender; and it is no ground of demurrer, or in arrest of judgment, and counts, where offences are of the same nature, counts at common law, and on a statute, may be joined, 1 *Chitty C. L.* 175. In misdemeanor, no objection can be made to joining several in the same indictment on any stage of the proceeding. 2 *Burr.* 984. * * *"

Commonwealth v. *Gillespie,* 7 Sergeant & Rawle's Rep. (Pa. Supreme Ct.), 469, 476 (1822).

"We think the authorities justify us in holding that two offenses, committed by the same person, may be included in the same indictment in different counts, where they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of the punishment are also the same, although they may be punishable with different degrees of severity: * * *."

Johnson v. *State,* 29 Ala. 62 (1856), 65 Am. Dec. 383.

"A defendant may be tried at the same time for different offenses, charged in the same indictment, if the offenses are of the same grade, and subject to the same punishment."

People v. *Gates*, 13 Wend. 311 (N. Y. 1835).

"* * * It has long been the practice in this Commonwealth to charge a defendant with various and distinct felonies in different counts of the same indictment, where they are of the same general nature, supported by similar evidence, and where the punishment to be awarded is of the same character. It is deemed that a defendant is sufficiently protected by the power which exists in the court to order separate trials upon the different counts, where there is, in its opinion, danger that a prisoner may be embarrassed in his defense. * * *"

Commonwealth v. *Mullen*, 150 Mass. 394, 23 N. E. 51, 52 (1890).

In this case the indictment contained two counts, each charging defendant as an accessory before the fact to two distinct burglaries.

E. Consolidation of Indictments—Analytical Test.

(a) In Pennsylvania.

We have shown that in England, prior to the Revolution, while a rule of practice had developed against the consolidation for trial of two or more indictments, whether the alleged offenses were felonies or misdemeanors, and against the inclusion of two or more offenses in different counts of the same indictment, whether of felonies or misdemeanors, this rule was subject to the sound discretion of the trial court. Also that none of these rules have been incorporated in Magna Carta or any of the other great charters, nor does it appear that they had been incorporated in any statute.

We have shown that in this country this rule of practice

had not been adopted so far as concerned the inclusion of several counts for separate and distinct misdemeanors in one indictment nor so far as concerned the consolidation for trial of two or more indictments against the same defendant or defendants charging separate and distinct misdemeanors.

Also that this common law rule of practice with regard to the joinder of separate and distinct felonies in different counts of the same indictment was adopted as a general rule subject to its modification by the trial court in the exercise of a sound discretion, such joinder never having been considered a cause of demurrer or ground for a motion in arrest of judgment or a matter in which error could be assigned. By analogy with the rules as to misdemeanors this rule, with reference to the joinder in one indictment of several counts charging felonies, applied also to the consolidation for trial of two or more indictments against the same defendant or defendants charging separate and distinct felonies.

In the case of *Withers vs. Commonwealth, supra* (1819), the consolidation for trial of two indictments against the same defendant, each charging a misdemeanor, was sustained.

In *Commonwealth* vs. *Hand,* 3 Philadelphia Reports (Pa.) 403, 405 (1859), defendant was tried and convicted on an indictment charging two distinct felonies. Motion in arrest of judgment overruled. The court says:

> "Upon the point taken of the joinder of two distinct felonies in one indictment, it is sufficient to say, that the defendant pleaded to the indictment without objection, and that he did not require the Commonwealth to elect upon which count they would proceed to trial. This is apart from the question as to whether the offence is not substantially one crime, * * *."

This case was in the Quarter Sessions Court of Philadelphia County and was not removed to any appellate court.

In the case of *Henwood* vs. *Commonwealth,* 52 Pa. 424

(1866), an indictment containing one count charging larceny, a felony, one count charging larceny by bailee, a misdemeanor, and one count for conspiracy to defraud, a misdemeanor, was sustained. The court, Agnew, J., says:

> "The English rule against the joinder of a felony and a misdemeanor in the same indictment has been greatly modified by modern decisions. It would be going too far to say now that it exists in any case, except it is where the offences are repugnant in their nature and legal incidents, and the trial and judgment so incongruous as to tend to deprive the defendant of some legal advantage: * * *."

In the case of *Commonwealth* vs. *Dupes*, 14 Pa. County Court Rep. 238 (1894), defendant was indicted for the felonious entry of certain railroad cars and larceny therefrom. At another number of the same sessions he was indicted for the felonious entry of a store-room of one, Detweiler, and larceny therefrom. At another number of the same sessions he was indicted for the felonious entry of the house of one, Fetter, and larceny therefrom. At another number of the same sessions he was indicted for the larceny of goods of the Grand Union Tea Company. All of these offenses were committed at about the same time. He was tried on the four indictments at the same time and was convicted on each indictment. Objection to the trial of the four distinct offenses at the same time was made by counsel for defendant upon motion for a new trial for the reason that "defendant was not allowed his right to a separate trial for each distinct offense". Motion overruled without opinion filed.

This proceedings was in the Court of Dauphin County, and the case was not appealed to any appellate court.

In the case of *Commonwealth* vs. *Wheeler*, 75 Pa. Superior Ct. 84, 87, 88 (1920), the consolidation for trial of two indictments against defendant was sustained. Each indictment charged a different offense, each offense charged was a misdemeanor and grew out of the same course of employment.

The action of the court in ordering both indictments to be tried together was assigned as error. The court held that the matter was to be determined by the court below in the exercise of a sound discretion.

In the case of *Commonwealth* vs. *Brown,* 264 Pa. 85, in an opinion filed March 10, 1919, the Supreme Court of Pennsylvania sustained the consolidation of two indictments for murder against the same defendant for the killing of two people, growing out of connected acts, as proper procedure. Brown, having broken into a store at night, was discovered by one, Elford, who, with a policeman, was attempting to force a way into the store, when two shots were fired therefrom, one of which struck and killed Elford and the other struck and killed the policeman. Two indictments were returned against Brown, one charging the murder of Elford, the other the murder of the policeman. These two indictments were consolidated and tried before the same jury. A verdict of guilty of murder in the first degree was returned in the one, and a verdict of murder in the second degree was returned in the other. Defendant was sentenced to electrocution on the former.

In the instant case the Supreme Court of Pennsylvania approved the procedure followed in the trial Court as in accord with the law of Pennsylvania (R. 233) therein citing with approval, as an authority in point on this very subject, the case of *Commonwealth* vs. *Brown, supra.*

The Court below (R. 334), differing with the Supreme Court of Pennsylvania, states that the *Brown case* is not an authority in the Valotta case. We submit that the Supreme Court of Pennsylvania is best qualified to interpret its own decisions, and that the similarity between the facts of the *Brown case* and those of the Valotta case is apparent.

In the case of *Commonwealth* vs. *Fembleaux,* 37 Lancaster Law Review (Pa.) 489 (1921), the defendant was tried simultaneously on two indictments, one of which charged larceny, a felony, and the other charged felonious entry, a felony. He was convicted on one and acquitted on the other. Objection was made by him before the jury was

sworn to his trial on both indictments at the same time. Rule for a new trial discharged. The court holds that it is within the discretion of the trial court to try a defendant on two indictments at the same time.

The practice followed in the instant case finds support in the following California cases:

This case was in the Quarter Sessions Court of Lancaster County, Pennsylvania, and was not appealed.

Under Pen. Code, Sec. 954, authorizing consolidation of two or more prosecutions of the same class, the court did not abuse its discretion in consolidating and trying at the same time two prosecutions for grand larceny, though committed more than one year apart.

People v. *Feigelman,* 223 Pac. 579.

In *People* v. *Potigian* 231 Pac. 593 (Cal. app.) Held consolidation two murder indictments against same defendant each charging murder of a different person is within sound discretion of the trial Court under Sec. 954 Pen. Code. In this case the two indictments were consolidated for trial and jury sworn. Immediately after jury sworn the Court directed the trial to proceed under one indictment only, which was done.

The order of consolidation assigned as error. Verdict of guilty affirmed.

Entirely too much reliance is placed by the Court below on certain provisions of the Pennsylvania Crimes Act of 1860 as proving that, under the law of Pennsylvania, distinct and separate offenses, even though closely related, could be joined in one indictment only as specified by statute. (R. 332.)

It is to be noted that the felony and misdemeanors joined in *Henwood* vs. *Commonwealth, supra,* were not included in the provisions of the Crimes Act of 1860 nor was there any statutory authority for such joinder.

The provision in the Crimes Act of 1860 for the joinder of *distinct* acts of embezzlement committed against the same master within the *period of six months* has no relation to the joinder of offenses which are closely related or connected

together, as the murders in the instant case, or to the consolidation for trial of such closely related offenses.

Members of the Bar of Pennsylvania testified that the practice here under consideration was unknown to them. (R. 250-292.) The purpose of this evidence seems to have been to prove what is the common law and practice of Pennsylvania, and the Court below finds that the practice contended for has no support in long established practice. (R. 335.)

This evidence was rebutted by four witnesses, all of whom had been connected with the office of the District Attorney at Pittsburgh in Allegheny County for many years, two of whom were common pleas judges in that county. (R. 295-308.) Judge Haymaker, out of an experience of thirty years in the District Attorney's office and on the bench, stated that where a defendant has been arraigned on two or three separate indictments, including murder indictments, if he does not elect to be tried upon one and there is no objection upon the part of his counsel, the practice has always obtained that he is tried upon all of the indictments at one time. (R. 305.)

However, the best proof of what is the common law of a State or of what is the authorized practice in its courts is to be found in the decisions of its highest court. The Supreme Court of Pennsylvania, in the case of *Commonwealth* vs. *Brown, supra,* and in its affirmance of the judgment in the Valotta case has approved the practice here complained of as being, under the facts of this case, proper practice in, and in accordance with, the law of Pennsylvania. How can individual members of the bar be permitted to prove the contrary? How can a United States Court, upon conflicting evidence, reverse the Supreme Court of the State upon what is or is not the established practice within that State?

The Federal Supreme Court will accept as conclusive the interpretation of the State Constitution and the conformity of legislation thereto.

Hunter vs. *Pittsburgh,* 207 U. S. 161, 176.

Also as to the existence of rights under the common law and the incidents thereto.

Marshall vs. *People of New York,* 254 U. S. 380, 385.
Bonner vs. *Gorman,* supra.
Kryger vs. *Wilson,* supra.

We do not understand that any question of the equal protection of the law arises in this case, but in anticipation of any such argument desire at this point to suggest that this rule of practice, being approved by the Pennsylvania Courts, would be applied to every case arising under similar facts, at the discretion of the District Attorney and the trial Court.

Equal protection of the laws is not denied by a law or course of procedure which would have been applied to any other person in the State under similar circumstances and conditions.

Tinsley vs. *Anderson,* 171 U. S. 101.

If a classification relating to the operation of a criminal statute is not arbitrary but based upon valid reasons and distinctions, it is not invalid as denying the equal protection of the laws.

Finley vs. *California,* 222 U. S. 28.
Hayes vs. *Missouri,* 120 U. S. 68.
Bowman vs. *Lewis,* 101 U. S. 22, 31,
Brown vs. *New Jersey,* 175 U. S. 172.

(b) In the United States Courts.

In the Federal practice the consolidation of indictments is governed by the Act of February 26, 1853, c. 80, Sec. 1, 10 Stat. 162, Comp. Stat., Sec. 1690 (R. S. Sec. 1024), which is as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined

in one indictment in separate counts; and if two or more indictments are found in such cases, the Court may order them to be consolidated."

It is not intended by the phrase "which may be properly joined" as used in this section to limit the joinder or consolidation to charges which might have been joined at common law, but merely to vest the trial Court with the discretion to refuse to permit a joinder or consolidation where it would prevent a fair trial or be unjust to the defendant.

Dolan vs. *United States,* (1904) 133 Fed. 440, 69 C. C. A. 274.

In *Pointer* vs. *United States,* 151 U. S. 396, 398-404 (1894), an appeal from a United States Circuit Court, defendant was tried for murder on an indictment containing two counts, each charging the murder of a different person. He moved to quash the indictment on the ground that it charged two distinct felonies and moved that the District Attorney be required to elect on which count he would claim a conviction, both of which motions were overruled. After the evidence was in he revived his motion to require the District Attorney to elect, which was overruled. He was convicted of murder on each count, two verdicts being rendered.

This Court states that the question presented on the appeal was "whether two distinct charges of murder can properly be embraced in one indictment".

The opinion proceeds to state that, while the defendant must not be embarrassed in his defense by a multiplicity of charges to be tried by one jury, the joinder in one indictment, in separate counts, of different felonies of the same class and grade and punishment is in the sound discretion of the Court.

In that case the "two murders were committed at the same place, on the same occasion, and under such circumstances, that the proof in respect to one necessarily threw light upon the other". The three men were in

company together and the killing of one immediately preceded the killing of the other, so closely, that it was difficult, if not impossible, to separate the proof of one charge from the proof of the other.

The judgment was affirmed.

In *Logan* vs. *United States,* 144 U. S. 263, 295 (1892), four defendants were indicted under four separate indictments. The first indictment, in the first count, charged the defendants (a) with a conspiracy to injure and oppress citizens of the United States in the free exercise and enjoyment of the right to be secure from assault or bodily harm and to be protected against unlawful violence while in the lawful custody of a marshal of the United States, and (b) with the murder of E. Marlow in the prosecution of said conspiracy. Other counts in this indictment were substantially similar to the first except that some of them alleged A. Marlow to have been the person murdered.

The other three indictments were similar to the first (pp. 265-266).

Five other indictments had previously been returned against some of the same defendants and others, the counts being similar to the first count of the four indictments specified (p. 267).

These nine indictments were consolidated for trial to which consolidation the defendants excepted (pp. 265-266).

Subsequently, the order of consolidation of indictments was set aside so far as to separate the five earlier indictments and the consolidation of the other four was confirmed, to which order no exception was taken (p. 266). Upon trial some of defendants were acquitted and the jury, disagreeing as to others, was discharged.

Subsequently an additional indictment, including additional defendants, and charging the same conspiracy and same murder as charged in the preceding four indictments, was consolidated with said four indictments, without exception by defendants (p. 270). Upon this re-consolidated indictment defendants were tried, some were found guilty of the conspiracy charged and not guilty of murder, the others were acquitted (pp. 275-276).

These indictments resulted from an attempt made to

take the two Marlows and others from the custody of the United States Marshal during the course of which the two Marlows were killed (pp. 272-274).

On appeal to this Court it was held (p. 296) that objection to the consolidation of the indictments could not prevail.

This Court says:

> "* * * the four indictments, * * * were charges against the same persons 'for the same act or transaction,' or, at least, 'for two or more acts or transactions connected together,' and therefore within the very terms and purpose of the section of the Revised Statutes above quoted, and might perhaps have been ordered, in the discretion of the court, to be tried together, independently of any statute upon the subject. See *United States* v. *Yarbrough*, 110 U. S. 651, 655; *United States* v. *Marchant*, 25 U. S. 12 Wheat. 480; *Withers* v. *Com.* 5 Serg. & R. 59. And to this order no exception was taken.
>
> "By the third order of consolidation, indeed, made at February term, 1891, shortly before the trial, a new indictment against different persons for the same crime was consolidated with the four indictments. But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict."

Ex Parte Yarbrough, 110 U. S. 651, was a petition for a writ of *habeas corpus* to discharge relators from confinement after conviction in a United States Court of a conspiracy to prevent by force etc. certain citizens, lawfully entitled to vote, from voting for members of Congress.

The indictments, four in number, on which petitioners

were tried, charge, in each one, all of the defendants with a conspiracy as above indicated, directed against a different person in each indictment. These four indictments were consolidated for trial.

Petition for writ denied.

It appears that a practice similar to that followed in the instant case was followed in the United States Federal Court for the Eastern District of Texas, as appears from the opinion in the case of *Hotema* vs. *United States,* 186 U. S. 413, 421, 422, where the defendant's special plea of former jeopardy was overruled.

Defendant was indicted for the murder of Coleman and the opinion of the Supreme Court sets out that it appeared, in the plea of former jeopardy, that the defendant on the same day on which he killed Coleman also killed two other persons, and that two indictments were found charging defendant with the murder of each of such persons; that the indictments were thereupon consolidated for trial; that upon his trial on the consolidated indictments the defense set up was insanity; and that he was found not guilty by reason of insanity.

The indictment in the case under review was for the killing by the defendant of the third of the three persons, and it was upon these facts that he set up the plea of once in jeopardy.

In this manner this consolidation of two indictments charging the same defendant with the murder of two different persons came to the attention of the United States Supreme Court, and although the practice was not assigned as error, it was passed by without any adverse comment.

In *Williams* vs. *United States,* 168 U. S. 382, the consolidation of indictments for extortion in exacting money from divers Chinese immigrants at various times for permission to land and remain within the United States sustained.

Consolidation of indictments for stealing letters from a post office at various times sustained.

United States vs. *Brent,* Fed. Cas. No. 14640.

Two counts, each charging the same defendants with the burning of a different building, may be joined in an indictment for arson.

United States vs. *Cardish,* (D. C. 1906) 145 Fed. 242.

Separate indictments against the same persons each charging them with having aided and abetted a different person in using a false certificate of citizenship as evidence of a right to vote, charge acts or transactions connected together, and may properly be consolidated.

Dolan vs. *United States,* supra.

Such an uncertain rule of practice, so safeguarded, cannot be held to be a fundamental right or a fundamental principle of "liberty and justice inherent in the very idea of free government", one to be rated "as an immutable principle of justice which is the inalienable possession of every citizen of a free government" to be "ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property."

Federal Consolidation Act affected.

It may be observed that if the right to a separate trial before a separate jury upon each of several indictments charging the murder of different persons is guaranteed by the due process clause of the Fourteenth Amendment to every defendant in a State court, then such right is guaranteed to every defendant in a United States Court under the due process clause of the Fifth Amendment. If that be true then the right must be applied to all cases in which such charges are of felonies other than murder because there never has been any distinction made, in respect to these matters, as between felonies. Indeed it is doubtful if, under the English common law, any distinction was made in this respect as between felonies and misdemeanors.

If the lower Court's position is here affirmed little practical value will remain in the Act of Congress relating to the consolidation of indictments.

F. The Common Practice of the People.

Taylor in Due Process of Law, Section 20, page 51, quotes with approval the statement of Savigny that instead of considering law as the creation of the will of individuals, he regarded it as the natural outcome of the consciousness of the people, like their social habits or their language.

Mr. Justice Moody in *Twining* vs. *New Jersey,* (supra, p. 113), in connection with his comment that "it would be going far to rate it (privilege against self incrimination) as an immutable principle of justice which is the inalienable possession of every citizen of a free government", adds "it is nowhere observed among our own people in the search for truth outside the administration of the law."

We take it that what is meant by these expressions is that our people, in the search for the truth of a charge against a person, universally want to know what the accused has to say about the matter, expect him to speak concerning it and construe his silence as an admission of guilt.

Certainly the people in determining the guilt or innocence of one charged with two murders closely related in time and place and circumstances desire and expect to know the facts of each in determining the truth of the charge in the other.

This is particularly true in case there is no denial of the killing under either charge and the only question involved in either is one of intent.

Such is the instant case. In determining the intent of Valotta in killing Couch, his pursuer, the facts of the killing of Hopkins are necessarily involved. How else can motive be determined—why did he shoot with every apparent intent to kill his pursuer? was it not because he had just committed a murder and was fleeing? The former homicide and the flight are essential in determining motive. This fact becomes more apparent when it appears that his pursuer was an officer of the law and the jury has found, as is evident from the verdict, that he knew such fact.

The same is true with respect to the killing of Hopkins. He claimed it was done in self-defense. If so, why should

he kill a pursuing officer? The fact that he did so is strong evidence that he did not kill Hopkins in self-defense.

The people in the consideration of each of these cases would demand to know and knowing, would consider, the facts in connection with the other.

(2) *Application of above Rules to Consolidation of the Indictment in the Valotta Case.*

The consolidation for trial before one jury of the indictment charging Valotta with the murder of Hopkins with that charging him with the murder of Couch was a matter of procedure in connection with a jury trial within the sound discretion of the trial Court, a matter for State regulation entirely unaffected by the Federal Constitution, under the foregoing authorities (*Frank* vs. *Mangum and Garland* vs. *Washington*, pp. 34, 35, this brief), unless such consolidation constituted a denial of fundamental rights (*Brown* vs. *New Jersey*, p. 22, this brief) or a fundamental principle of liberty and justice inherent in the very idea of free government (*Twining* vs. *New Jersey*, p. 27, this brief).

This was not a case of the introduction into the trial of one offense, of evidence tending to establish the commission of an entirely distinct, different and separate crime. It is the introduction of evidence of "two or more acts or transactions connected together" (words of the Federal Consolidation Act, p. 48, supra). The killing of Couch cannot be adequately described without detailing the facts surrounding the killing of Hopkins. If Valotta had been tried separately on these indictments, the evidence relating to the other would have been admissible in each; in the Couch case for the purpose of showing motive and intent; in the Hopkins case as negativing the self-defense theory. Each jury would have known all the facts in the other case. Then how can it be found that this consolidation constituted the denial of fundamental rights or the denial of a fundamental principle of liberty and justice inherent in the very idea of free government?

Historical Test.—Negative proof that "due process of

law", as the term was understood and applied in England prior to the Revolution, did not prohibit the consolidation for trial of indictments, against the same defendant, charging separate and distinct offenses, is found in the fact that no provision against the same is found in any of the great charters or in any statute.

Positive proof that it did not prohibit such practice is found in the fact that it was merely a rule of practice and, in the unanimity of the authorities, that the matter was within the prudence and discretion of the judge (pp. 36-38 supra). Also in the fact that the authorities show the rule was adopted in this country in a very limited way, always within the discretion of the trial Court; and that the joinder of such separate and distinct offenses in different counts in one indictment was not ground for demurrer or arrest of judgment and that the exercise of discretion by the trial Court on a motion to quash or to require an election was not subject to review (pp. 39-41, supra).

Fundamental rights and fundamental principles of liberty and justice inherent in the very idea of free government are given more positive protection than this. Rules of practice that remain so uncertain and are to be applied by the trial Judge within his discretion, dependent upon the facts of the case as they develop, cannot be considered as within such fundamental rights and principles.

Analytical Test.—Negative proof that such consolidation of indictments was not prohibited by the due process clause is found in a general way in the fact that the Supreme Court of the United States has sustained all State laws, statutory or judicially declared, which have come before it, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law (*Twining* vs. *New Jersey*, p. 27, this brief). Also in the fact that such Court has held that the due process clause of the Federal Constitution did not prohibit the States from denying trial by jury; from the substitution of informations for indictments; from the enactment that the possession of policy slips raises the presumption of illegality; from admitting the deposition of an absent witness in a criminal case (p. 27, supra); from inflicting capital punishment by

electricity; admitting the testimony of other distinct offenses committed near the scene of a murder and immediately afterwards (p. 29, 33, supra); from dispensing with formal arraignment or plea (p. 33, supra); or from permitting the defendant to waive his right to be present at all stages of a trial for felony (p. 34, supra).

Proof is found in a positive way in the Federal Consolidation Act; and from the fact that under that Act this Court has affirmed the consolidation of several indictments charging the murder of two persons; of indictments charging conspiracy each directed against a different person (pp. 49-50, supra).

It also appears that in the Federal District Courts consolidations have been sustained of indictments each charging the murder of a different person; indictments charging extortion from divers persons at different times; and that in one of such courts an indictment was sustained containing two counts each charging arson directed against different buildings (pp. 52, 53, supra).

Finally—what was done here in the administration of the law was exactly what our people would do in the search for truth as to the guilt and the degree of guilt of this defendant—consider the evidence in the other homicide in arriving at a verdict in each, where the two are so closely related in time, place and circumstances.

All the requirements of due process of law as laid down by this Court are found in this case—jurisdiction in the trial Court, notice to the defendant and an opportunity to be heard (pp. 9, 15, 27, supra), and we submit that the deant was not deprived of any of his constitutional rights and that, therefore, the judgment of the lower Court should be reversed, the writ dismissed and the prisoner remanded.

(3) *Defendant Having Consented to be Tried Simultaneously on the Two Indictments is Bound by Such Waiver.*

The Supreme Court in its opinion affirming the judgment in this case says:

"The fifth attack made on the integrity of the ver-

> dict is that it was improper to try the defendant upon the two indictments at the same time. The record shows that he made no objection to be thus tried. Assuming, but not deciding, that notwithstanding his failure to object on trial, he can now be heard to raise this question, the simultaneous trial on two indictments charging murder is warranted * * *."

The Court below held that the defendant could not consent to be so tried. (R. 335-337.).

This question was raised under the twelfth and thirteenth assignments of error.

We know of no additional authorities on this subject in this State, except the case of *Commonwealth* vs. *Hand, supra* (p. 43, this brief).

In *Logan* vs. *United States*, (p. 50, supra), speaking of a consolidation of indictments, each charging conspiracy and each the murder of two persons, appears the following (pp. 296, 297):

> "* * * But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict."

In *Frank* vs. *Mangum*, 237 U. S. 309, 338, the defendant on trial for murder was absent at the time of rendition of the verdict. Upon waiver by his counsel of his right to be present the verdict of guilty was received. This Court held that the prisoner's right to be present at all stages of the trial was not such an incident of due process of law that could not be waived.

Defendants who interposed no objection to the consolida-

tion of indictments when made cannot object for the first time after judgment.

Haynes vs. *United States,* (1900) 101 Fed. 817, 42, C. C. A. 34.

A defendant not objecting to the consolidation for trial of separate indictments must be deemed to have waived the irregularity.

Silvie v. *State,* 173, S. W. 857, 117 Ark. 108.

(4) *Absence of Specific Order of Consolidation— Deprivation of Challenges.*

(a) Consolidation.

The Court below finds that the record of the trial Court did not disclose that there was any offer by the Commonwealth, or any order of the Court, to consolidate the indictments; any consideration by the Court as to the right or the propriety of trying the cases together; any exercise of discretion by the Court in relation thereto; any putting of the Commonwealth to an election as to which case it would try; any suggestion to the defendant as to his right to a separate trial; any consent on the behalf of the defendant or his counsel, to a joint trial on the two indictments; or any notice to the defendant of his right to twenty peremptory challenges under each indictment. (R. 326, 327.)

The propriety of this finding is raised by the fourth and fifth assignments of error.

Consolidation of indictments in Pennsylvania is not governed by statute. The District Attorney decides the order in which cases shall be called for trial, subject to the approval of the Court. In this case the usual practice was followed. The prisoner was arraigned on one indictment and issue joined, and immediately thereafter he was arraigned on the other and issue joined. The selection of the jury to try the two cases then proceeded, and it was sworn in each case.

There was no question but what the prisoner and his counsel knew and understood what was being done, and there is no doubt but what they preferred to take chances before one jury only rather than before two.

If defendant, through his counsel, had objected to this proceeding, he had ample opportunity to raise the question prior to the receipt of the verdict. The record is silent as to whether or not the defendant or his counsel specifically assented to this simultaneous trial of the two indictments.

However, under the authorities the question is not when an order of consolidation was made or when the Court finally exercised its discretion with regard to the propriety of such consolidation, but the question is whether or not the trial Court did, in the exercise of a sound discretion, approve the consolidation.

The question of the propriety of the consolidation of the indictments in this case has been decided against the defendant and appellee by the Judge who tried the case, and by the Judges of the trial Court in Banc and by the Supreme Court of Pennsylvania.

The question here for review is the action of the State of Pennsylvania, which is finally determined after the action of the Court of last resort.

Frank vs. *Mangum, supra.*

The trial Court does not abuse its discretion in overruling a defendant's motion to require an election by the Government between two charges of murder where the indictment was that the two murders were committed on the same day and at the same place. The discretion of the Court may best be exercised at the conclusion of the evidence.

Pointer vs. *U. S.*, 151 U. S. 396, 403, 404.

Held three indictments charging conspiracy in use of the mails could in the discretion of the court be tried together even though not formerly consolidated. Citing *Logan* v. *U. S.*, 144 U. S. 263, 306, and *Pointer* v. *U. S.*, 151 U. S. 396, 403.

Brown vs. *United States*, 143 Fed. 60, 66, 74, C. C. A. 214.

(b) Deprivation of Challenges.

The law of Pennsylvania authorizes twenty peremptory challenges in a murder trial. In the selection of the jury in the instant case the defendant did not exhaust his twenty peremptory challenges. (R. 11)

We contend that the right to any specific number of peremptory challenges is in no sense a vested right and is not within the protection of the due process clause of either the Federal or State Constitution, and we contend further that it is strictly a State question.

In *Brown* vs. *New Jersey*, 175 U. S. 172, it was held that a State statute providing for struck juries in certain cases, in which the number of peremptory challenges is five instead of twenty, as allowed in a trial before an ordinary jury, is not unconstitutional as violating the due process clause of the Federal Constitution.

In that case Mr. Justice Brewer says (pp. 175, 178):

> "In providing for a trial by a struck jury, * * * no fundamental right of the defendant is trespassed upon. The manner of selection is one calculated to secure an impartial jury, and the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. * * *
>
> "* * * Either party, state or defendant, may apply for a struck jury, and the matter is one which is determined by the court in the exercise of a sound discretion. There is no mere arbitrary power in this respect, any more than in the granting or refusing of a continuance. * * * That in any given case the discretion of the court in awarding a trial by a struck jury was improperly exercised may perhaps present a matter for consideration on appeal, but it amounts to nothing more."

Inasmuch as the right of trial by jury in a State Court is not guaranteed under the Federal Constitution (*Walker* vs. *Sauvinet*, 92 U. S. 90; *Hurtado* vs. *California*, 110 U. S. 516, 535; *Maxwell* vs. *Dow*, 176 U. S. 581, 602), there can be no

vested right in a defendant with respect to the number of jurors or the method under which they are selected or the number of challenges allowed.

Respectfully submitted,

GEORGE W. WOODRUFF,
Attorney General of Pennsylvania.

JAMES O. CAMPBELL,
First Deputy Attorney General of Pennsylvania.

SAMUEL H. GARDNER,
District Attorney of Allegheny County, Pennsylvania.

HARRY A. ESTEP,
First Assistant District Attorney of Allegheny County, Pennsylvania.

Attorneys for Appellant.